

Before the
Federal Communications Commission
Washington, D.C. 20554

Oct 8 9 55 AM '03

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In the Matter of

The Pay Telephone Reclassification and
Compensation Provisions of the
Telecommunications Act of 1996

CC Docket No. 96-128

REPORT AND ORDER

Adopted: September 30, 2003

Released: October 3, 2003

By the Commission:

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I. INTRODUCTION

1. In this Order, we adopt new payphone compensation rules that place liability on the facilities-based long distance carrier to compensate payphone service providers (PSPs) for payphone-originated calls that are completed on that facilities-based long distance carrier's platform. This facilities-based long distance carrier is the switch-based reseller (SBR) or interexchange carrier that completes the call on a switch that it owns or leases.¹ We also establish a payment mechanism for SBRs to compensate PSPs for this liability. In satisfying its liability obligation to a PSP, the SBR must establish its own call tracking system, have a third party attest that the system accurately tracks payphone calls to completion, and pay a PSP directly based on the SBR's own call tracking data. Other facilities-based long distance carriers in the call path, if any, must provide reports to the PSPs of payphone-originated calls switched to another facilities-based carrier's platform.

2. We adopt these rules to ensure that PSPs are "fairly compensated" for all SBR completed calls made from their payphones under section 276 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996.² These rules satisfy section 276 by identifying the party liable for compensation and establishing a mechanism for PSPs to be paid. The rules we adopt today are based on what the Commission has learned from input over the past seven years from the payphone and SBR industries, and from experience in implementing section 276 in various orders addressing problems raised by the parties over the years.

3. This Order is the result of a court remand of an earlier attempt by the Commission to remedy problems in the payphone compensation rules. In January 2003, on a petition for review, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated and remanded this proceeding's *Second Order on Reconsideration*³ on the grounds that parties were not afforded proper notice and opportunity for comment.⁴ The D.C. Circuit held that the Commission violated the Administrative Procedure Act (APA) when it modified its rules without proper notice.⁵ The D.C. Circuit vacated the Commission's order, but stayed its mandate and its

¹ A "switch-based reseller" is a facilities-based long distance carrier that switches long distance traffic using a switch that it owns or leases. In those instances where the payphone-originated call is local, our rules apply to the local exchange carrier that completes the payphone call on a switch that it owns or leases. For purposes of this Order, we will refer to any carrier that completes a payphone call as the SBR. We note that the obligations of switchless long distance resellers are not altered by this Order.

² We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as the Communications Act, or the Act. See 47 U.S.C. §§ 151 *et seq.* We refer to the Telecommunications Act of 1996 as the 1996 Act. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Second Order on Reconsideration, 16 FCC Rcd 8098 (2002) (*Second Order on Reconsideration*); remanded *sub nom.*, *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003) (*Sprint*).

⁴ *Sprint*, 315 F.3d at 372, 378.

⁵ *Id.*

vacatur of the *Second Order on Reconsideration* through September 30, 2003.⁶ As a result, the rules promulgated in the *Second Order on Reconsideration* remain in effect through September 30, 2003, but are vacated after that date.⁷

4. In May 2003, in response to the D.C. Circuit's decision, the Commission issued a *Further Notice of Proposed Rulemaking (Further Notice)*⁸ to seek comment on whether the rules adopted in the *Second Order on Reconsideration* or other new rules were necessary to satisfy section 276's requirements.⁹ Based on the comments filed in this proceeding and our findings that the rules adopted in the *Second Order on Reconsideration* can be improved, we now adopt alternative rules in this Order to address more specifically and effectively both the problems that PSPs have experienced in obtaining compensation from SBRs, and the problems that interexchange carriers have experienced prior to and after the adoption of the *Second Order on Reconsideration*. We cannot, however, make these new rules effective before September 30, 2003, when the rules adopted in the *Second Order on Reconsideration* will be vacated pursuant to the *Sprint* mandate. Additional time is needed to obtain clearances from the Office of Management and Budget (OMB) and to permit carriers sufficient time to take the steps necessary to come into compliance with the new rules. Thus, while we believe that the new rules strike the best balance between full compensation for the PSPs and maximum fairness to other carriers, we must adopt interim rules to ensure that PSPs continue to receive compensation during this transition period. For this purpose, we adopt, for a limited period, the rules originally adopted in the *Second Order on Reconsideration*. We, and all of the affected parties, have a body of experience with these rules built up over the last two years during which they have resulted in compensation to the PSPs, while proving generally workable in the industry as a whole. In light of this experience, we believe that these rules, though less effective than the rules adopted today, provide a reasonable alternative to ensure continued compensation during the interim period.

II. BACKGROUND

5. Section 276 of the Act requires the Commission to "prescribe regulations that . . . establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . ."¹⁰ In devising a compensation plan to ensure that PSPs are fairly compensated, the Commission

⁶ See *Sprint v. FCC*, No. 01-1266, slip op. (Apr. 1, 2003).

⁷ As discussed below, we readopt the rules set forth in the *Second Order on Reconsideration* on an interim basis, effective immediately, pending the effective date of the new rules we adopt today. These interim rules are set forth in Appendix B.

⁸ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Further Notice of Proposed Rulemaking, 18 FCC Rcd 11003 (2003) (*Further Notice*).

⁹ *Id.* at 11005, para. 3.

¹⁰ 47 U.S.C. § 276(b)(1)(A). Previously, PSPs were not assured of receiving revenues for coinless access code or subscriber 800 calls dialed from their payphones, even though PSPs are prohibited from blocking such calls under the Telephone Operator Consumer Services Improvement Act (TOCSIA), Pub. L. No. 101-435, 104 Stat. 986 (continued....)

has examined various methods of: (1) identifying the party responsible for compensation; and (2) ensuring that PSPs are paid based on accurate data for every completed call.

6. In the *First Payphone Order*,¹¹ the Commission determined that “the primary economic beneficiary of payphone calls should compensate the PSPs.”¹² In our prior orders, the Commission has identified three categories of such entities, depending on whether such entity completed the payphone originated call: (1) facilities-based long distance carriers (usually the interexchange carriers); (2) switchless long distance resellers; and (3) SBRs. In instances where interexchange carriers complete calls, the Commission concluded that the primary economic beneficiary was the interexchange carrier and required “all interexchange carriers that carry calls from payphones [. . .] to pay per-call compensation.”¹³

7. In the case of switchless long distance resellers, the Commission recognized that although they are the primary economic beneficiary for calls made by their customers, they do not have the facilities to track calls.¹⁴ In the interests of lower costs and administrative convenience, the Commission placed the responsibility on the entity with control over the tracking data, the underlying facilities-based long distance carrier, to compensate the PSPs on the switchless reseller’s behalf.¹⁵ The underlying facilities-based long distance carrier could then recover payphone compensation from its switchless reseller customers.¹⁶

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(1990). Section 226(c)(1)(B), enacted in TOCSIA, provides that a telephone “aggregator” (an entity such as a PSP or a hotel that makes public telephones available using an OSP) must “ensure that each of its telephones . . . allows the consumer to use “800” and “950” access code numbers to obtain access to the provider of operator services desired by the consumer.” 47 U.S.C. § 226 (c)(1)(B). This provision is implemented by the Commission’s regulations at section 64.704(a), “Call blocking prohibited.” 47 C.F.R. § 64.704(a). The proscription has the effect of also precluding PSPs from blocking calls to subscriber 800 numbers, because when toll-free numbers are dialed, no distinction exists between subscriber 800 calls and toll-free number access code calls. See *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Second Report and Order, CC Docket No. 91-357, FCC Rcd 3251 (1992).

¹¹ *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-388, Report and Order, 11 FCC Rcd 20541 (1996) (*First Payphone Order*).

¹² *Id.* at 20584, para. 83.

¹³ *Id.* n. 293 In the *First Payphone Order*, for purposes of the payphone compensation rules, the Commission defined interexchange carriers to include LECs (both incumbent and non-incumbent) to the extent that LECs carry compensable payphone calls.

¹⁴ *Id.* at 20586, para. 86.

¹⁵ *Id.*

¹⁶ *Id.* (finding that facilities-based carriers could “impose the payphone compensation amounts on these [reseller] customers”); see also *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 FCC Rcd 21233, 277, para. 92 (1996) (*Order on Reconsideration*) (“If a carrier does not maintain its own switching capability, then, as set forth in the [*First Payphone Order*], the first underlying carrier remains obligated to pay compensation to the PSP in lieu of its [reseller] customer that does not maintain a switching capability.”).

8. With regard to SBRs, in the *Order on Reconsideration*, the Commission recognized that SBRs were the primary economic beneficiary of SBR directed payphone calls, were capable of tracking calls and, accordingly, held them responsible to pay compensation to the PSPs.¹⁷ However, even after these orders, there remained confusion in the marketplace as to whether the long distance carrier or the SBR was responsible for payphone compensation when both were involved in routing the call. The payphone compensation rules in effect at that time were silent on the issue.¹⁸

9. To assist PSPs in identifying which carrier was responsible for compensation, the Common Carrier Bureau, now the Wireline Competition Bureau (Bureau), set forth reporting requirements for interexchange carriers and SBRs in the *Coding Digit Waiver Order*.¹⁹ The Bureau stated that, where a SBR identified itself as responsible for compensating the PSP, the interexchange carrier must notify the billing PSP that the SBR, not the interexchange carrier, was responsible for paying per-call compensation for a particular 800 number.²⁰ The Bureau stated that neither interexchange carriers nor SBRs may "avoid compensating PSPs by withholding the name of the carrier responsible for paying per-call compensation, thereby avoiding the requirements of the *Payphone Orders* and section 276."²¹

10. The Commission provided further clarification in the *Bell Atlantic-Frontier Order*,²² which concluded that the *Order on Reconsideration* and the Bureau's *Coding Digit Waiver Order* placed the tracking and compensation obligations squarely on the facilities-based carriers including facilities-based resellers. The Commission also stated that "the logical construction of the language from the *Coding Digit Waiver Order* requires a first facilities-based carrier to pay [the PSP] unless the reseller has identified itself to the first facilities-based carrier as being responsible for paying compensation."²³

11. Nevertheless, PSPs argued that these compensation and reporting requirements were not sufficient to ensure that they were fairly compensated, because PSPs were still unable to

¹⁷ *Order on Reconsideration*, 11 FCC Rcd at 21277, para. 92.

¹⁸ The rules in effect at that time provided that "every carrier to whom a completed call from a payphone is routed shall compensate the payphone service provider." See 47 C.F.R. § 64.1300(a). As noted above, the D.C. Circuit vacated the *Second Order on Reconsideration*'s amendment of these rules, but stayed the vacatur of the rules through September 30, 2003.

¹⁹ *The Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, CC Docket 96-128, 13 FCC Rcd 10893 (1998) (*Coding Digit Waiver Order*).

²⁰ *Id.* at 10915-16, para. 38.

²¹ *Id.*

²² *In re Bell Atlantic-Delaware, Inc. v. Frontier Communications Services, Inc.; Bell Atlantic-Delaware, Inc. v. MCI Telecommunications Corp.*, File No. E-98-48, E-98-49, Memorandum Opinion and Order, 16 FCC Rcd 8112 (2001) (*Bell Atlantic-Frontier Order*).

²³ *Id.* at 8120, para. 15.

locate the SBR responsible for payment and because the interexchange carriers were not maintaining call completion data for payphone originated calls.²⁴ In a *Petition for Clarification* of the payphone compensation rules, a coalition of PSPs argued that the rules were still unclear as to which carriers were responsible for compensating the PSPs.²⁵ The PSPs stated that interexchange carriers would not identify which SBRs were responsible for compensation.²⁶ More importantly, the PSPs contended that, in many instances, neither the interexchange carrier nor the SBR maintained call tracking data for payphone originated calls.²⁷ In the *Second Order on Reconsideration*, the Commission agreed that PSPs were suffering shortfalls in compensation when calls were routed from an interexchange carrier to a SBR.²⁸ The Commission was “persuaded by APCC’s arguments that the failure in the compensation regime results from insufficient information about the reseller being made available to the PSP” and that SBRs have little incentive to come forward voluntarily with payments.²⁹

12. The Commission attempted to remedy the carriers’ lack of accountability in self-identifying and call tracking. First, the Commission required the “first underlying facilities-based interexchange carrier to whom the LEC directly delivers the call to compensate the PSP,”³⁰ presumably because the PSPs would be able to identify the interexchange carrier even if it did not come forward. The interexchange carrier could then seek reimbursement from the SBR.³¹ Second, to address the issue of deficient call tracking data, the Commission conducted an examination of which entity in the call path was best situated to determine if a payphone originated call was answered by the called party.

13. At that time, the Commission concluded that a SBR was unable to determine whether a call originated from a payphone.³² In the *First Payphone Order*, the Commission required the local exchange carriers (LECs) to transmit with every payphone call the Automatic Number Identification (ANI) digits for each payphone, including each LEC payphone, to enable a facilities-based carrier to recognize in its call tracking system that a call had originated with a

²⁴ See *Petition for Clarification*, CC Docket No. 96-128, NSD File No. L-99-34, filed by RBOC/GTE/SNET Payphone Coalition (collectively the RBOC Payphone Coalition) (Feb. 26, 1999) (*RBOC Payphone Coalition Petition*).

²⁵ *Id.*

²⁶ *Further Notice*, 18 FCC Rcd at 11008, para. 9.

²⁷ *Id.*; see also OCMC Comments at 2-3.

²⁸ *Second Order on Reconsideration*, 16 FCC Rcd at 8103, para. 8.

²⁹ *Id.* at 8105, para. 15.

³⁰ *Id.*

³¹ *Id.* at 8106, para. 18.

³² *Id.* at 8105, para. 16.

payphone.³³ At the time of the *Second Order on Reconsideration*, the Commission believed that these ANI digits were not transmitted to the SBR and therefore found that a SBR could not maintain accurate tracking call data.

14. Based on the comments filed in the *Second Order on Reconsideration* proceeding, the Commission found that the first underlying facilities-based interexchange carrier to which the LEC directly delivers such calls was best situated to provide call routing information to the PSPs.³⁴ The interexchange carriers were known to receive the payphone-identifying ANI digits, and the Commission believed that the interexchange carriers had the capability to determine whether calls delivered to the SBR switch were in fact answered by the called party.³⁵ The Commission believed that an interexchange carrier could either institute its own call tracking system or could contract with its SBR customers for tracking data.³⁶

15. Based on the findings in the *Second Order on Reconsideration*, the Commission adopted rules requiring the first facilities-based long distance carrier to which a LEC routes a compensable coinless payphone call to: (1) compensate the PSP for completed calls at a mutually agreeable rate; (2) track or arrange for tracking of the call to determine whether it is completed and therefore compensable; and (3) provide to the PSP a statement of the number of coinless calls it receives from each of that PSP's payphones.³⁷ The Commission required each reseller or debit card customer whose number is dialed on a coinless basis to reimburse the first facilities-based long distance carrier: both for the amount paid by that carrier to the PSP, and for that carrier's cost of tracking the call and providing such information to the PSP. The Commission also encouraged PSPs and SBRs to enter into private contractual arrangements with each other for direct payment of compensation to PSPs.³⁸ As noted above, the D.C. Circuit did not address the merits of the *Second Order on Reconsideration* and its payphone compensation rule amendments, because it vacated that Order and its rules on procedural grounds alone.

³³ *First Payphone Order*, 11 FCC Rcd at 20592, para. 98; see also Letter from Albert H. Kramer, Attorney, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Aug. 25, 2003) American Public Communications Council (APCC) (APCC Aug. 25 *Ex Parte*) at 1-2.

³⁴ *Second Order on Reconsideration*, 16 FCC Rcd at 8105-06, para. 16.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 8108, para. 21.

³⁸ *Id.*

16. In the *Further Notice*, the Commission tentatively concluded that, prior to the adoption of the *Second Order on Reconsideration*'s amendments to the payphone compensation rules, the "PSPs were not receiving fair per-call compensation."³⁹ The Commission further observed that:

a major source of [payphone compensation] shortfall resulted from the lack of information available to PSPs and that fact that PSPs [were] in the position of being dependent on switch-based resellers to identify themselves voluntarily as responsible for paying dial around compensation (which the Commission concluded [in the *Second Order on Reconsideration*] that resellers have little incentive to do.)⁴⁰

The Commission then invited comment on how it should amend the payphone compensation rules to remedy these problems.⁴¹

17. Comments filed in response to the *Further Notice* include filings from interexchange carriers, PSPs, SBRs, trade associations and industry groups.⁴² Although all commenters agree that the statute requires the Commission to "ensure that payphone service providers are fairly compensated" for every completed coinless call, opinions as to how to ensure execution of this requirement diverge. The facilities-based long distance carriers, many of which are also SBRs, generally oppose readoption of the rules promulgated in the *Second Order on Reconsideration* because, these commenters argue, they place obligations on them to guarantee debts owed by another party and in many instances require them to overcompensate the PSPs.⁴³ In addition, the SBR commenters generally oppose readoption of those rules because they would prefer to pay PSPs directly in order to avoid paying the interexchange carriers compensation for tracking the data and collecting payphone compensation on behalf of the PSPs.⁴⁴ On the other hand, the PSPs that filed as the American Public Communications Council (APCC) and the RBOC Payphone Coalition (RBOC Coalition) argue that the Commission should readopt the payphone compensation rules promulgated in the *Second Order on Reconsideration* for the reasons set

³⁹ *Further Notice*, 18 FCC Rcd at 11010, para. 14.

⁴⁰ *Id.*, at 11009-10, para. 13 (citing *Second Order on Reconsideration*, 16 FCC Rcd at 8105, para. 15).

⁴¹ *Further Notice*, 18 FCC Rcd at 11010-11, paras. 15-17.

⁴² Appendix A lists the commenters in this proceeding.

⁴³ IDT Corporation (IDT) Comments at 2-9; IDT Reply Comments at 1-2; Sprint Corporation (Sprint) Comments at 8-10; AT&T Comments at 17-19; WilTel Corporation, LLC (WilTel) Comments at 1-2; Global Crossing Comments at 8-10.

⁴⁴ Joint Comments of ASCENT, FOCAL, and US LEC (ASCENT Joint Comments) at 2.

forth in that order; they contend that the procedural deficiencies that were the basis for the *Sprint* court's vacatur do not undercut the substantive basis for those rules.⁴⁵

III. DISCUSSION

A. Prior Compensation Regimes

18. For the reasons set forth in detail below, we affirm the *Further Notice*'s tentative conclusion that, prior to the regime adopted in the *Second Order on Reconsideration*, the PSPs suffered compensation shortfalls. We find that these shortfalls were due to two fundamental problems with the prior compensation regime – the same two problems identified in the *Second Order on Reconsideration* – (1) the PSPs had insufficient information about the identity of the SBRs and the number of calls they completed, and (2) the SBRs lacked an incentive to voluntarily identify themselves as the liable parties and to pay compensation for every completed call. These shortfalls are addressed in the new rules we adopt today in a way we believe will more effectively result in “fair compensation” under section 276 than did the rules adopted in the *Second Order on Reconsideration*.

19. We agree with commenters that argue that, prior to the adoption of the *Second Order on Reconsideration*'s rules, PSPs were not fairly compensated as contemplated by section 276.⁴⁶ At that time, the Commission had rules in place obligating SBRs to pay for calls completed on their platforms, but the PSPs had no way of knowing which party was completing their calls. Specifically, the PSPs lacked sufficient information to identify the SBR and to track the calls to completion.⁴⁷ The rules, prior to the *Second Order on Reconsideration*, presumed that the SBR would identify itself as the liable party in instances where it had completed a call.⁴⁸ However, because the rules did not require self-identification, the SBRs lacked incentive to come forward with compensation.⁴⁹ Moreover, PSPs lacked the information necessary to identify the origins of the calls switched to a SBR's platform, and could not identify which entity had completed the call or even if a call had been completed.

⁴⁵ See APCC Aug. 25 *Ex Parte* at 1-2; see also IDT Reply Comments at 2.

⁴⁶ See APCC Comments at 5; APCC Reply Comments at 6-7; RBOC Payphone Coalition Comments at 5. *But see* Sprint Comments at 7.

⁴⁷ APCC Comments at 5-6; RBOC Comments at 3; MCI Comments at 5-6; ASCENT Joint Comments at 4.

⁴⁸ MCI Comments at 6 (“[I]t is evident that many SBRs never invested in the facilities, nor did they develop procedures, to accurately match payphone identifiers (either from ANI lists, or coding digits or both) with switch records and then transfer them into formats that could be used to meet their payphone compensation responsibilities.”)

⁴⁹ Letter from Cronan O’Connell, Vice President-Federal Regulatory, Qwest Communications International Inc. (Qwest), to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Aug. 28, 2003) (Qwest Aug. 28 *Ex Parte*), Attach. (“SBRs have no incentives to accurately report the number of calls that were completed (i.e., ‘answered by the called party’)”); MCI Comments at 5-6.

20. As noted above, the *Second Order on Reconsideration* attempted to resolve these problems by making the interexchange carriers the collection agents for the PSPs. Because, after two years of experience with these rules, we find that this approach, although preferable to the rules that preceded it, did not optimally ensure fair compensation, we are adopting new rules today to replace it. The *Second Order on Reconsideration's* approach was predicated on the Commission's finding that only interexchange carriers had the capability to track payphone calls to completion.⁵⁰ In that order, the Commission found that the interexchange carriers could either (1) use existing technology to determine whether calls switched to a SBR's platform were completed by that SBR; or (2) use their bargaining power to negotiate contracts with SBRs whereby the SBRs would track calls switched to their platforms to completion and provide this call completion data to the interexchange carrier.⁵¹ Based on the record in this proceeding, we now agree with commenters that the interexchange carriers do not have the technology to track SBR directed calls to completion.⁵² Moreover, for the reasons discussed in more detail in sections C and D below, the interexchange carriers have generally not been able to negotiate reliable call tracking contracts with the SBRs.⁵³ Thus, since the implementation of that order's rules in 2001, the interexchange carriers have not been able to implement a means of tracking calls to completion, either through a technical solution or via contract.⁵⁴ As discussed further below, based on the current record, we now find that only the SBRs have the ability to track accurately payphone calls completed on their platforms because only SBRs possess all of the relevant call completion data.⁵⁵

21. Depending on how the interexchange carriers and the SBRs agreed to fulfill their respective payment obligations, PSPs may have been under or overcompensated. We find that the *Second Order on Reconsideration's* requirement making the interexchange carriers

⁵⁰ *Second Order on Reconsideration*, 16 FCC Rcd at 8105, para. 16.

⁵¹ *Id.*

⁵² See, e.g., AT&T Comments at 14, Attach. A, Declaration of Diane Parisi (AT&T Parisi Declaration) at para. 12 (stating that it is technically impossible for an interexchange carrier to determine whether a SBR completes a call after it is switched to the SBR's platform); Sprint Comments at 13 (asserting that SS7 signaling network does not possess data that would permit an interexchange carrier to track calls once they are switched to a SBR's platform); see also MCI Comments at 12-13; IDT Comments at 15; Letter from John E. Benedict, Senior Attorney, Sprint, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Aug. 14, 2003)(Sprint Aug. 14 *Ex Parte*), at 5.

⁵³ AT&T states that, after one and a half years, it has been able to negotiate only a handful of call completion tracking agreements with SBRs. AT&T Parisi Declaration at para. 18. We discuss, *infra*, why these call tracking agreements have proved unworkable.

⁵⁴ AT&T Comments at 14; Letter from Teresa Marrero, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Sept. 5, 2003) (AT&T Sept. 5 *Ex Parte*), at 1; Sprint Comments at 13; Sprint Aug. 14 *Ex Parte* at 5; MCI Comments at 12; IDT Comments at 15.

⁵⁵ See section C *infra* for a detailed discussion; see also Letter from James H. Lister, Attorney, CommuniGroup of K.C., Inc., d/b/a GCI, CommuniGroup of Jackson, Inc., Transtel Communications, Inc., NTS Communications, Inc., and Century Long Distance, LLC, (Sept. 12, 2003) (Joint SBR Sept. 12 *Ex Parte*) (stating that these SBRs have facilities to track calls to completion).

responsible for the SBRs' payphone liabilities, was not the most effective way to ensure that the PSPs were "fairly compensated," given the fact that, as discussed in more detail below, the interexchange carriers are not the primary economic beneficiaries of PSP services.⁵⁶ This requirement often resulted in interexchange carriers having to pay the PSPs for all calls switched to the SBR platform, even though not all of those calls were "completed" (i.e., answered by the called party).⁵⁷ This occurred because, as discussed in more detail below, the interexchange carriers in most instances did not know whether a SBR had completed a call once the interexchange carrier had transferred the call to the SBR switch.⁵⁸ Nevertheless, because the interexchange carriers were obligated to pay under the rules, they were compelled to base compensation on all calls they sent to the SBR switch, even though they knew that not all of those calls were being completed.⁵⁹ Due to disagreements with SBRs over call tracking data, the interexchange carriers were not always adequately reimbursed by the SBRs for their payments to the PSPs.⁶⁰

22. Moreover, we agree with commenters that in some instances, under the *Second Order on Reconsideration*, PSPs may have been undercompensated.⁶¹ For example, while some interexchange carriers simply billed the SBRs for their overpayments to the PSPs, some SBRs would then recover some of this money through a true-up process, based on the SBR's call tracking data.⁶² Because the completion rate for calls switched to the SBR platform was less than 100%, the interexchange carriers would deduct a true-up for non-completed calls from the SBR's

⁵⁶ See section C *infra*.

⁵⁷ While the rules required the first interexchange carrier in the call path to pay the PSPs, section 276 requires payment only for calls answered by the called party. 47 U.S.C. § 276(b)(1)(A). See AT&T Sept. 5 *Ex Parte* at 1.

⁵⁸ See AT&T Comments at 15; AT&T Parisi Declaration at para. 17 (contending that because most of AT&T's SBR customers declined to provide their own call completion data to AT&T, AT&T "had no choice but to overcompensate PSPs by paying them for every call delivered to SBRs, without regard to whether those calls were completed"); see also Sprint Comments at 13.

⁵⁹ Sprint Comments at 9; AT&T Parisi Declaration at para. 17; Letter from Carl Wolf Billek, IDT Corporation, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Sept. 12, 2003) (IDT Sept. 12 *Ex Parte*), at 1 (contending that the rules have proven unworkable). The Joint SBRs state that the interexchange carriers attempted to pass these costs to them. CGI SBR Sept. 12 *Ex Parte* at 3.

⁶⁰ See AT&T Comments at 16. Due to data disputes and contentions by some SBRs that it is not entitled to recover its administrative costs via surcharges, Sprint states that it has been able to collect only 69% of its payphone surcharges. Sprint Comments at 12.

⁶¹ APCC also points that "the dispersal of compensation obligations among hundreds of [SBRs], most of whom were individually too small to be economical targets of PSPs' collection efforts, guaranteed that a large percentage of the total compensation owed would fall through the cracks of the compensation system." APCC Comments at 11 (citing APCC Declaration of Ruth Jaeger) (emphasis in the original); but see Sprint Reply at 12-14 (stating that APCC's claims of undercompensation are exaggerated).

⁶² AT&T Comments at 15; Qwest Comments at 7; Letter from Cronan, O'Connell, Vice-President-Federal Regulatory Affairs, Sprint, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Sept. 10, 2003) (Sprint Sept. 10 *Ex Parte*) Attach.

next bill.⁶³ In turn, the interexchange carriers would deduct this true-up from their next payment to the PSPs. In many cases, the PSPs and the interexchange carriers challenge the accuracy of SBR data and the incentives of SBRs to pay PSP compensation.⁶⁴ In this manner, the true-up process may arguably have resulted in undercompensation to the PSPs. Because the rules did not provide any methods to verify SBR data, however, it is impossible to make a conclusion in this regard.

23. In addition, because the guarantor requirement effectively compels SBRs to use interexchange carriers as collection agents, the interexchange carriers typically add surcharges to each payphone call to recover tracking and collection expenses.⁶⁵ Although the record indicates that many SBRs desire to pay PSPs directly to avoid this added expense,⁶⁶ the rules set forth in the *Second Order on Reconsideration* provide PSPs no incentive to do so, as they prefer to receive payment from the interexchange carrier instead.⁶⁷ Thus, the Commission's policy objective, articulated in the *Second Order on Reconsideration*, to encourage parties to enter into private contractual arrangements, has been frustrated by the way the rules have altered industry incentives.

24. In sum, applying two years experience with our rules, we find that although the *Second Order on Reconsideration* made significant progress towards remedying many problems associated with PSP compensation shortfalls, it did not optimally resolve other fairness issues. Thus, as described below, we adopt new rules that squarely place liability on the primary economic beneficiary of the PSP services, *i.e.*, that carrier from whose switch a payphone call is completed. We further require carriers to provide PSPs more detailed information concerning the identity of that carrier when it is a SBR. Although, the new rules we adopt today more effectively address these concerns than do the rules adopted in the *Second Order on Reconsideration*, we also find it appropriate to adopt the rules from the *Second Order on Reconsideration* on a strictly interim and temporary basis – that is, until the transition period to the new rules has expired. We find that, they still ensure a better flow of compensation and information to the PSPs than did the rules that preceded them. As explained below, the rules we adopt today will result in better tracking of calls and more accurate amounts of compensation being paid. In the interim, however, the rules adopted in the *Second Order on Reconsideration* are the only tested way that we have of ensuring that PSPs are compensated during the short, additional time that will be needed to put the more effective system in place.

⁶³ AT&T Parisi Declaration at para. 19 ("Often 50 percent or more of the delivered calls [from AT&T to the SBR's platform] are identified as not completed during the true-up process.").

⁶⁴ See AT&T Comments at 16; Qwest Aug. 26 *Ex Parte* Attach.

⁶⁵ IDT Comments at 22-23; IDT Reply Comments at 12-13; Telstar Comments at 6.

⁶⁶ Joint SBR Sept. 12 *Ex Parte* at 2 (objecting to surcharges imposed by interexchange carriers).

⁶⁷ IDT Comments at 38.

B. Statutory and Policy Framework for New Rules

25. With the experience of the *Second Order on Reconsideration*'s rules in mind, we now establish a revised compensation system that more fully implements the requirements of section 276. As discussed below, we find that by requiring the SBR to pay compensation and track completed calls, and by imposing new audit, certification, and reporting requirements, our new rules will more effectively address our concerns that prior compensation plans did not provide PSPs with enough information about SBRs and did not provide SBRs with sufficient incentives to compensate PSPs for their services. In crafting these new rules, we necessarily start by looking to the requirements of section 276. The statute is clear that a compensation plan should "fairly compensate" a PSP for "each and every completed intrastate and interstate call."⁶⁸ The Commission has interpreted the statutory phrase "completed call" to mean "a call that is answered by the called party."⁶⁹ The Commission has also interpreted the term "fair" to mean a plan that is fair to all parties.⁷⁰ However, the statute does not specify, and is therefore ambiguous as to: (1) the party responsible for payphone compensation under a plan; and (2) a mechanism for ensuring that the responsible party pay compensation based on completed calls. Where statutory terms are ambiguous, the Commission has the discretion to interpret the terms in a reasonable manner.⁷¹ Doing so, the Commission may examine the statutory context in which the term is used, analyze the statute's objectives, and rely on its agency expertise in the area.⁷²

26. In deciding how to reasonably resolve these issues, we are guided by section 276's objective that PSPs be "fairly compensated," and recognition that Congress passed the statute at a time when PSPs were receiving little or no compensation for coinless calls. We are also guided by our practical expertise in overseeing the various compensation regimes we have implemented since the adoption of section 276 in the 1996 Act. Based on the statutory goals and this expertise, we find that we can best ensure "fair compensation" for every "completed call" by requiring the entity that: (1) is the primary economic beneficiary of PSP services; and (2) has control over the most accurate call completion data to compensate the PSPs. We also find that we can better ensure "fair compensation" by enacting a compensation plan that specifically addresses the PSPs' need to identify the liable entity and that specifically requires the liable entity to pay based on the most accurate "completed call" data available.

⁶⁸ 47 U.S.C. § 276(b)(1)(A).

⁶⁹ *First Payphone Order*, 11 FCC Rcd at 20573-74, para. 63; *Order on Reconsideration*, 11 FCC Rcd at 21242, para. 14; *Coding Digit Waiver Order*, 13 FCC Rcd at 10915, para. 36.

⁷⁰ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Fifth Order on Reconsideration and Order on Remand, 17 FCC Rcd 21274, 21302-03 at para. 82 (2002) (*Fifth Order on Reconsideration*).

⁷¹ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984).

⁷² *Id.* See also *Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997).

C. SBR Liability

27. We conclude that, because SBRs are the primary economic beneficiaries of coinless payphone calls transferred to their switch and because they possess the most accurate call completion information for such calls, it is appropriate as both a legal and policy matter to assign them liability under section 276 to fairly compensate the PSPs.⁷³ Given the ambiguity of section 276 regarding which party is responsible for compensating the PSP, we look at the context in which the provision is applied. As noted above, we are guided by section 276's directive that PSPs receive "fair compensation" for each and every completed call. We continue to believe that the best way to implement this directive is to assign liability to the entity that is the primary economic beneficiary and the entity that possesses the most accurate data necessary to determine whether a payphone call has been completed. We conclude that for calls routed to a SBR switch for completion, this entity is the SBR.⁷⁴

28. *Primary economic beneficiary.* We find that SBRs are the primary economic beneficiaries receiving PSP services. The Commission first employed the phrase "primary economic beneficiary" in the *First Payphone Order* as a means of identifying the party responsible for compensating the PSPs under section 276.⁷⁵ Subsequently, the Commission held in the *Order on Reconsideration*, that SBRs were the "primary economic beneficiaries" of payphone calls and thus, responsible to pay PSP compensation.⁷⁶ Notably, even in the *Second Order on Reconsideration*, which was vacated on other grounds, the Commission did not reconsider its prior findings regarding which entities were the primary economic beneficiaries of payphone calls, but merely adopted a new mechanism for payphone compensation that the Commission then believed would resolve PSP difficulties in terms of call completion and compensation.⁷⁷

29. We find that an interexchange carrier is not the primary economic beneficiary when it is not the last carrier in the call path that completes a payphone call.⁷⁸ To illustrate, the SBR's

⁷³ See IDT Sept. 12 *Ex Parte* at 1 (maintaining that SBRs, as the primary beneficiary of toll free calls, must be responsible for their per call compensation).

⁷⁴ Bulletins requests that the Commission classify wireless and enhanced service providers as primary economic beneficiaries under our payphone compensation rules. Bulletins Comments at 15. We decline to do so because our *Further Notice* did not raise the issue of wireless and enhanced service providers, and the other commenters in this proceeding did not address this issue. The more appropriate means for Bulletins to bring this issue to the Commission's attention would be a petition for a rulemaking or a declaratory ruling.

⁷⁵ *First Payphone Order*, 11 FCC Rcd at 20584, para. 83

⁷⁶ *Order on Reconsideration*, 11 FCC Rcd at 21277, para. 92.

⁷⁷ *Second Order on Reconsideration*, 16 FCC Rcd at 8106, para. 18.

⁷⁸ AT&T Comments at 17; IDT Sept. 12 *Ex Parte*; Global Crossing Comments at 9 (arguing that responsibility should be assigned to the carrier that derives revenues from end-user payphone calls). *But see* Letter from Aaron M. Panner, Counsel, RBOC Payphone Coalition, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, (Sept. 22, 2003) at 1.

customers use payphones in order to use the SBR's services to complete a call, whether it is a simple 800 number, a calling card, or a prepaid calling card. In other words, the PSPs provide services to the SBRs so that the SBRs can render services to their SBR customers. The SBR should be liable to pay for services rendered by its service providers.⁷⁹

30. We find that the Commission's prior rules resulted in administrative inefficiencies without the proportionate economic benefit. For example, because in some instances the SBR failed to provide interexchange carriers with adequate call completion data, the interexchange carrier had no choice but to pay the PSPs for every call delivered to SBRs, without regard to whether those calls were actually completed.⁸⁰ If, or when, the interexchange carrier actually received the necessary call completion data from the SBRs, it was compelled to engage in a lengthy and complicated 'true-up' process to recover the overpayments from the SBR that the interexchange carrier had made to the PSPs. In instances where the interexchange carrier is not the primary economic beneficiary of the call, we agree with AT&T that imposing upon interexchange carriers the financial and administrative burdens associated with compensating PSPs under the rules adopted in the *Second Order on Reconsideration* is not a viable long-term arrangement.⁸¹

31. We disagree with APCC's arguments that it is a departure from Commission precedent to find the SBR to be the primary economic beneficiary, and that the PSP's low administrative cost and ease associated with placing liability on the interexchange carrier should outweigh other factors.⁸² First, although the Commission, in the *Second Order on Reconsideration*, required the interexchange carrier to collect PSP compensation from the SBR, the Commission has never reconsidered its holding that the SBR is the primary economic beneficiary. Second, the Commission has previously rejected the argument that third parties should bear the liabilities of other companies, finding that "[s]ection 276 requires us to ensure that per-call compensation is fair, which implies fairness to both sides."⁸³ Moreover, the D.C.

⁷⁹ As discussed above, we use the abbreviation SBR here to apply to both interexchange carriers and SBRs that complete payphone calls. See para. 1, *supra*.

⁸⁰ Sprint Comments at 9. "Sprint has no choice but to process all such SBR calls based on answer supervision, because the rules make Sprint responsible for any shortfalls in compensation. Sprint thus has been forced to overstate the number of compensable calls every quarter since these rules were imposed. The Commission itself has suggested such overpayment is 'inconsistent' with Section 276, but under these rules it is simply impossible to avoid." See also AT&T Comments at 2.

⁸¹ AT&T Comments at 15; Global Crossing Comments at 9; IDT Sept. 12 *Ex Parte* at 1.

⁸² Specifically, APCC argues that it is irrelevant which entity receives the primary economic benefit, so long as the PSP is paid. APCC Reply Comments at 29. See Letter from Robert F. Aldrich, Attorneys for APCC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (July 22, 2003) (APCC July 22 *Ex Parte*) at 2. APCC argues that there is no rule or statutory provision requiring that only the "primary economic beneficiary" may be held responsible for paying dial-around compensation. *Id.*

⁸³ *Fifth Order on Reconsideration*, 17 FCC Rcd at 21302-03, para. 82. Section 276 does not permit the Commission to lawfully "require one company to bear another one's expenses." *Id.* (citing *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555, 556 (D.C. Circuit 1997) (*Illinois Public v. Telecom* (continued....))

Circuit has held that section 276 does not permit us to use administrative convenience as a basis to require the larger interexchange carriers to pay payphone compensation owed by smaller carriers.⁸⁴ In addition, the D.C. Circuit affirmed our discretion not to require certain companies to pay the compensation owed by other delinquent companies.⁸⁵ Accordingly, we now find that the Commission overemphasized alleged administrative convenience in the *Second Order on Reconsideration* compared to the goal of ensuring fair compensation.

32. To the extent that APCC's argument is based on ease in collecting owed debts, the D.C. Circuit, in upholding the reasonableness of the Commission's decision in *APCC v. FCC* found that the PSPs had remedies to recover this debt from the delinquent carriers.⁸⁶ A failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act.⁸⁷

33. We are not persuaded by APCC's argument that shifting collection responsibility to the PSPs would be more burdensome.⁸⁸ Specifically APCC contends that, under a "SBR pays" rule, the PSP would face greater difficulties than the interexchange carriers that pass the call in obtaining cooperation, call data, and compensation from the SBR, because interexchange carriers have a business relationship that provides "leverage" over the SBR.⁸⁹ We disagree that the interexchange carriers necessarily have such "leverage." Interexchange carriers will, in many cases have already paid a PSP by the time a SBR might dispute the amount claimed by the interexchange carrier. Therefore, despite the terms of their service agreements, an interexchange carrier has no particular leverage to collect amounts owed to it. Indeed, the record indicates that the Commission should not assume that interexchange carriers can simply disconnect SBRs as the burden on the interexchange carrier doing so may be significant.⁹⁰ Therefore, whatever

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Assoc.)). See also Sprint Comments at 8 (contending that current payphone rules make Sprint responsible for SBRs' bad debt).

⁸⁴ *Illinois Public v. Telecom Assoc.*, 117 F.3d at 566.

⁸⁵ *APCC v. FCC*, 215 F.3d 51, 56 (2000) (upholding Commission decision declining to include debt owed to the PSPs by third parties in the per-call rate for coinless payphone calls).

⁸⁶ See, e.g., Letter from Albert H. Kramer, Robert F. Aldrich, Attorneys for APCC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 91-128, (Sept. 22, 2003)(APCC Certification and Audit *Ex Parte*) at 1; see also *APCC v. FCC*, 215 F.3d at 57.

⁸⁷ See 47 U.S.C. §§ 201(b), 276.

⁸⁸ APCC Reply Comments at 4. See APCC July 22 *Ex Parte* at 2-3.

⁸⁹ APCC Reply Comments at 4-5, 24-27; APCC Reply Comments, Declaration of Allan C. Hubbard, paras. 4-7; APCC July 22 *Ex Parte* at 2-3; see also APCC Comments at 8, 10-15.

⁹⁰ Sprint and other commenters point out that "disconnecting SBRs over nonpayment of payphone surcharges is a drastic, disruptive, expensive and dangerous step that invites litigation, and magnified disputes." Sprint Reply Comments at 5. Moreover, the facilities-based long distance carrier's "experience has been made worse by the Commission's [past] failure to expressly empower [facilities-based interexchange carriers] to require cooperation or (continued....)

“leverage” an interexchange carrier may have in its direct relationship with a SBR, is not sufficient to justify the burden-shifting APCC requests.

34. As discussed below, under our new rules, we address past SBR alleged misconduct by imposing an affirmative duty to self-report, self-identify and pay.⁹¹ We further impose a structural solution by requiring the SBR to implement a call tracking system, the accuracy of which must be verified by an independent third-party auditor. We find that these measures will provide some assurance to the PSP that every SBR is identified and that it is receiving accurate data from that SBR. Moreover, as the other commenters indicate, it is very difficult to reconcile interexchange carrier data and SBR data.⁹² However, as described below, we address this problem by placing new reporting obligations on the other carriers involved in passing the call to the SBR platform. Therefore, after the PSP receives payment from the SBR, it will be able at least to corroborate whether the number of compensable calls being reported by the SBR is consistent with the *volume* being reported by the other carriers in the call path. Accordingly, we conclude that these new measures will reduce the likelihood of any SBR misconduct.

35. *Access to Most Accurate Call Completion Data.* Based upon the record in this proceeding, we now conclude that the SBR is the carrier best able to determine whether a payphone originated call directed to a SBR switch has been answered by the called party.⁹³ We note that in order to track a payphone call to completion, an entity must identify whether a call originates from a payphone (via information digits), where it originates and terminates (via ANI information), and whether it is completed and therefore compensable (via answer supervision).⁹⁴ However, as commenters point out, the interexchange carrier can track when the toll free call begins and ends, but has no way of discerning: (1) whether the call it delivers is only on the first leg of the call from the end-user’s location; and (2) whether the call is launched and answered as an end-to-end completed call.⁹⁵ While the interexchange carrier that passes the call may have limited reporting information and know the identity of the SBR to which it routes calls, only the SBR possesses such information for calls that terminate on the SBR platform.⁹⁶ Thus, because

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even to surcharge based on answer supervision (or any other basis) in the event a SBR refuses to cooperate; *Id.* at 5-6. See also Sprint Comments 14-16; MCI Comments at 17-24; Qwest Comments at 6-9; AT&T Comments at 7-8.

⁹¹ We expect these SBR affirmative duties will ensure that SBRs maintain reliable, accurate call tracking and payment systems. See APCC Sept. 22 Certification and Audit *Ex Parte* at 2.

⁹² See AT&T Comments at 16.

⁹³ IDT Comments at 2, 16; Sprint Comments at 13; AT&T Comments at 14; ASCENT Joint Comments at 2-3; Joint SBRs Sept. 12 *Ex Parte* at 2.

⁹⁴ See WilTel Comments at 2; Sprint Comments at 13; MCI Comments at 12-15; Telstar Comments at 7-8; Qwest Comments at 6-9; AT&T Comments at 4; Global Crossing Comments at 3-4; IDT Comments at 15.

⁹⁵ See AT&T Comments at 14; AT&T Parisi Declaration at para. 12; Sprint Comments at 13; MCI Comments at 12-13; IDT Comments at 15.

⁹⁶ Sprint Comments at 13. AT&T points out that this is particularly true with respect to applications such as prepaid cards where a significant number of the toll free calls AT&T delivers to a SBR may not be completed calls by the SBR to the called party. AT&T Comments, Parisi Declaration at paras. 60-69.

the SBR has access to the most accurate data as the only party whose switch receives answer supervision from the called party, the SBR is the carrier best able to track payphone calls to completion.⁹⁷ Because we wish to promote the transfer of accurate data between parties, in order to ensure that PSPs are “fairly compensated,” we find it reasonable to assign SBRs the compensation obligation. To facilitate the SBR’s execution of its compensation responsibilities, we require each facilities-based long distance carrier in the call path to transmit the call-origination data, the information digits and the ANI information, with each call that is switched to another facilities-based long distance carrier’s platform.⁹⁸

D. Compensation Regime

36. We conclude, based upon the record developed in our *Further Notice*, that the Commission’s efforts in the *Second Order on Reconsideration* to implement clear and effective payphone compensation rules can be improved upon. Therefore, in this Order, we strengthen the compensation regime by:

- requiring the SBR on whose platform the coinless payphone call terminates to implement a call tracking system and pay the PSP directly;⁹⁹
- requiring the interexchange carrier that passes the call to provide more of the information it currently collects to the PSP;
- expanding the group of carriers in the call path that must report data to the PSP; and
- expanding the types of information that carriers in the call path must report to the PSP.

These requirements will ensure that payment is based upon accurate call tracking data, and provide the PSPs with the information they need to obtain and verify payment, as well as further reduce the ability of SBRs to avoid detection and payment.¹⁰⁰

37. As we have noted, section 276 does not set forth a compensation regime – it simply states that the Commission must prescribe regulations ensuring that all PSPs are fairly compensated for every completed intrastate and interstate call.¹⁰¹ Thus, in the *Second Order on*

⁹⁷ See Joint SBR Sept. 12 *Ex Parte* at 2 (noting that SBRs have capability to track payphone calls to completion).

⁹⁸ We note that MCI states that interexchange carriers are already transmitting this information with switched calls. MCI Comments at 11-12; see also OCMC Comments at 4-5; OCMC Reply Comments at 3-5.

⁹⁹ See Sprint Aug. 14 *Ex Parte* at 8 (stating that SBRs seeking direct arrangements with PSPs, must do so with all PSPs).

¹⁰⁰ See APCC Sept. 22 Certification and Audit *Ex Parte* at 2; see also Letter from Frank W. Krogh, Attorney, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Sept. 26, 2003) (OCMC Sept. 26, 2003 *Ex Parte*) at 2.

¹⁰¹ 47 U.S.C. § 276.

Reconsideration, noting the problems PSPs faced in collecting per-call compensation for coinless calls involving SBRs, the Commission found that to fairly compensate the PSP, the interexchange carrier must compensate the PSP and seek reimbursement from the SBR. In adopting these rules, the Commission expected that the interexchange carriers would be able to negotiate contracts with their SBR customers whereby the SBRs would provide them with the SBRs' call completion data.¹⁰² We now find that the existence of a contractual relationship between the interexchange carrier and the SBR, by itself, is not the most effective means to ensure accurate compensation and call tracking.¹⁰³ For example, AT&T states that, despite the existence of contracts, these rules left the interexchange carriers in the difficult position of attempting to provide accurate compensation figures based not only upon data generated by their own systems, but data from the SBR, over which the interexchange carrier has no control.¹⁰⁴ Moreover, the record indicates that call completion data generated by SBR switches and software are not configured to match up with the interexchange carrier's systems, making it difficult to reconcile call tracking data.¹⁰⁵ We therefore find that the mere existence of contractual privity between the SBR and the interexchange carrier, did not address and resolve the technical issues associated with tracking calls.

38. To improve upon past attempts to fairly compensate the PSP, we require the SBR to establish its own comprehensive call tracking system and, in the same manner that interexchange carriers have compensated PSPs for calls completed by the interexchange carrier, compensate the PSP directly on a quarterly basis for all coinless payphone calls completed by the SBR.¹⁰⁶ We find that this arrangement will reduce the likelihood of under or overcompensating PSPs by placing responsibility on the party with the most accurate information. We require that the comprehensive call tracking system should analyze the SBR switch data and produce accurate reports on payphone originated completed calls. To ensure the accuracy of the SBR's call tracking system, absent some other arrangement agreed upon by the SBR and the PSP, the rules we adopt today require that the SBR: (1) engage an independent, third-party auditor to verify the accuracy and reliability of the SBR's call tracking system; (2) file in this docket with the Secretary of the Commission, a report prepared by an independent auditor concerning the SBR call tracking system's accuracy and reliability (SBR System Audit Report); and (3) send copies

¹⁰² The Commission expected that the interexchange carriers and the SBRs would be able to reconcile their separate data records to track calls to completion. *Second Order on Reconsideration*, 16 FCC Rcd at 8105, para. 16.

¹⁰³ Sprint Comments at 14-15.

¹⁰⁴ AT&T Comments at 7.

¹⁰⁵ AT&T Comments at 7, 8, 16 (stating that its call data frequently does not match the SBR's call data); *see also* AT&T Paris Decl. at paras. 10, 19. Thus, "even minor discrepancies in tracking reports generated by the [interexchange carrier's] call recording system, such as the time a call begins and ends, may make it impossible for either party to reconcile and use the other's call tracking data." AT&T Comments, Paris Declaration at para. 17; AT&T Comments at 16 ("[T]ime lag [in data] makes it impossible for AT&T computers to match up two legs of the call.").

¹⁰⁶ *See* MCI Comments at 27; Letter from Larry Fenster, Sr. Economist, MCI, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Aug. 19, 2003) (MCI Aug. 19 *Ex Parte*); AT&T Comments at 3, 17.

of the SBR System Audit Report to its interexchange carriers and PSPs. Under this procedure, we relieve the interexchange carrier of any indemnification obligations set forth in the *Second Order on Reconsideration* or subsequent orders interpreting the *Second Order on Reconsideration*. However, as described below, the interexchange carrier must continue to provide the PSP with the critical tracking and identification information to identify all coinless payphone calls addressed to the particular SBR, at the time of scheduled quarterly compensation payment.¹⁰⁷ Moreover, for a short, interim period, the interexchange carriers must continue to provide compensation under the rules from the *Second Order on Reconsideration*, readopted here on a temporary basis.¹⁰⁸

39. We conclude that the SBR may use the technology of its choice to track coinless payphone calls to completion, provided that its system permits an independent third-party auditor to verify the accuracy of the data so that the PSP is assured that it is properly compensated. We require that the audit follow standards established by the American Institute for Certified Public Accountants (AICPA) and that the SBR permit the PSP to inspect the independent third-party auditor's certification criteria.¹⁰⁹ The AICPA standards require the auditor to perform an "examination engagement" and issue an opinion regarding the accuracy and reliability of the SBR's call tracking system.¹¹⁰ We note that, because the concept of materiality governs this type of audit, the independent auditor's report will conclude whether the SBR complied in all material respects with the factors set forth below regarding the required call tracking system.¹¹¹

40. We require SBRs to obtain an independent audit to ensure the SBR complied with the following criteria: (1) whether the SBR's procedures accurately reflect the Commission's rules, including the attestation reporting requirements we adopt today; (2) whether the SBR has a person or persons responsible for tracking, compensating, and resolving disputes concerning payphone completed calls; (3) whether the SBR has effective data monitoring procedures; (4) whether the SBR adheres to established protocols to ensure that any software, personnel or any

¹⁰⁷ See discussion of "Carrier Reporting Duties," section E, *infra*. MCI Comments at 27, 28. MCI argues that the data reports will ensure that PSPs will be able to compare the number of calls sent to each of the SBR's toll free numbers from each of a PSP's payphones, with the payments received from the SBR for each completed payphone call associated with a particular PSP. MCI claims that these reports will allow the PSP to determine whether compensation payments appear reasonable on their face, or whether they will need to request additional information. See also AT&T Comments at 2-3 ("[T]he proper resolution of these issues requires a flexible solution that combines private agreements supplemented with mandatory regulations for instances where voluntary efforts fail").

¹⁰⁸ See discussion of interim rules in section B, *infra*.

¹⁰⁹ A 100% compliance rate on each of the criteria set forth below is not required to satisfy the audit. Instead, the independent third-party auditor should ensure, based upon a representative sample of data, that the tracking system is accurate and reasonably capable of accounting for and resolving discrepancies between PSP and SBR data.

¹¹⁰ See American Inst. of Certified Pub. Accountants, STATEMENTS ON STANDARDS FOR ATTESTATION ENGAGEMENTS NO. 10, at § 6.30 (Jan. 2001) (AICPA ATTESTATION STANDARDS).

¹¹¹ *Id.* at §§ 6.36 (explaining concept of materiality), 6.64 (explaining reporting issues related to material noncompliance).

other network changes do not adversely affect its payphone call tracking ability.¹¹² (5) whether the SBR has created a compensable payphone call file by matching call detail records against payphone identifiers; (6) whether the SBR has procedures to incorporate call data into required reports; (7) whether the SBR has implemented procedures and controls needed to resolve disputes; (8) whether the independent third-party auditor can test all critical controls and procedures to verify that errors are insubstantial; and (9) whether the SBRs have adequate and effective business rules for implementing and paying payphone compensation, including rules used to: (i) identify calls originated from payphones; (ii) identify compensable payphone calls; (iii) identify incomplete or otherwise noncompensable calls; and (iv) determine the identities of the PSPs to which the SBR owes compensation. We do not adopt a standardized independent audit program because the auditing industry standards we apply herein require the independent auditor to develop a unique audit program tailored to the audited carrier. We recognize, however, that MCI has placed in the record useful information that independent auditors could use to develop their audit programs, and we expect independent auditors to adopt an audit program that includes, among other things, consideration of the proposed audit steps proffered by MCI.¹¹³

¹¹² See MCI Aug. 16 *Ex Parte* at 11.

¹¹³ Specifically, the auditor may consider the following information:

(a) Whether the SBR's business procedures accurately define a "completed call," and a "compensable call" (access code, subscriber 800, and non-commissioned 0+). See MCI Aug. 16 *Ex Parte* at 7.

(b) Whether the SBR employs persons responsible for: (1) drafting the necessary business requirements; (2) developing and maintaining systems to create payphone call records from the SBR switch records; (3) overseeing dispute resolutions about payphone compensation; and (4) implementing and maintaining procedures that create final compensation data sets. See MCI Aug. 16 *Ex Parte* at 9.

(c) Whether the SBR properly monitors and controls computer access to the call tracking and payment disbursement systems. See MCI Aug. 16 *Ex Parte* at 10.

(d) Whether the SBR has in place procedures to gather switch data, ANI data, the dialed number, and other identifier information and match it with payphone specific identifiers. See MCI Aug. 16 *Ex Parte* at 12.

(e) Whether the SBR develops reports of completed payphone calls associated with each toll-free number originated from valid payphone ANIs and whether the SBR has a valid list of payphone owners associated with payphone ANIs. See MCI Aug. 16 *Ex Parte* at 13.

(f) Whether the SBR maintains compensable call files and excluded data for 6 quarters; maintains monitoring reports that would assist in dispute settlement; has capability to perform customized reporting to help resolve disputes; submits independent accounting reports into this docket, providing the name and contact information of persons responsible for payphone compensation and dispute resolution. See MCI Aug. 16 *Ex Parte* at 15.

(g) Using a representative sample of the company's payphone call records, whether dial-around calls are properly captured; incomplete calls are not captured; and commissioned calls are excluded. See MCI Aug. 16 *Ex Parte* at 14.

41. Upon the effective date of the rules we adopt today, the SBR shall file its audit report with the Commission's Secretary for its compliance during the previous year.¹¹⁴ Consistent with AICPA standards for attestation engagements, the auditor report shall consist of: (1) the SBR's representation concerning its compliance; and (2) the independent auditor's opinion concerning the SBR's representation compliance. As part of this audit report, we require the SBR to represent (and the auditor to verify) the SBR's network protocols that are designed to identify compensable phone calls and the SBR's business rules for implementing and paying payphone compensation. As noted above in the specific compliance criteria, the SBR's representation must disclose its criteria for identifying calls originating from payphones, its criteria for identifying compensable payphone calls, its criteria for indentifying incomplete or otherwise noncompensable calls, and its criteria used to determine the identities of the PSPs to which the SBR owes compensation.¹¹⁵ In addition, we recognize that SBRs sometimes use clearinghouses to compensate the PSPs.¹¹⁶ Thus, we require the SBR to indicate the clearinghouses, if any, that the SBR will use to make compensation payments and set forth the types of information that the SBR needs from PSPs in order to compensate the PSPs.¹¹⁷ The independent auditor's opinion will specify whether the SBR's representation is complete and accurate and, to the extent the SBR failed to comply with any of the requirements specified herein, the auditor's opinion will disclose such noncompliance.

42. To make the audit process minimally burdensome for SBRs, yet provide PSPs with adequate assurance of payment accuracy, we require that, in the years subsequent to a SBR's initial audit, the independent auditor either (1) verify that no material changes have occurred concerning the SBR's compliance with the criteria of the prior year's System Audit Report,¹¹⁸ or (2) if a material change has occurred concerning the Completing Carrier's compliance with the prior year's System Audit Report, verify that the material changes do not affect compliance with the audit criteria set forth in paragraph 40 above. To the extent any material changes have occurred, the SBR must disclose those changes¹¹⁹ and the auditor must verify that those changes comply with the audit criteria set forth in paragraph 40 above. If the SBR states in its

¹¹⁴ We recognize that for the initial audit, the SBR will not have had a tracking system in place for a full year. Thus, the initial audit report should be based on the SBR's compliance from the date that the tracking system is implemented and deployed through the date of the audit.

¹¹⁵ We note that, under Part 64 of our rules, LECs and PSPs must claim ownership of payphones for which they are due compensation.

¹¹⁶ We note that clearinghouses serve an important role in compilation, payment and disbursement. See *Fifth Order on Reconsideration*, 17 FCC Rcd 21305, at para. 91; see also APCC Aug. 12 *Ex Parte* at 1, 2.

¹¹⁷ We believe that this requirement will address PSPs' concerns that they do not have sufficient information about SBRs.

¹¹⁸ To the extent that the SBR's network has not materially changed after the first audit, this annual review should not be burdensome. Moreover, this annual review should be less burdensome if the SBR uses the same auditor. See APCC Sept. 12 Certification and Audit *Ex Parte* at 3, 4.

¹¹⁹ In this regard, we note that the SBR has an affirmative obligation to fully disclose any material changes concerning its call tracking system in its representation to the auditor.

representation that there have been no material changes in the prior year, the auditor must verify that no material changes have occurred and state as much in its report.¹²⁰

43. At the conclusion of these annual audits, the SBR must file a SBR System Audit Report, prepared by the auditor, in this docket with the Commission's Secretary. The SBR must also send this SBR System Audit Report to all PSPs for which the SBR completes payphone calls on its platform and to all facilities-based long distance carriers from which the SBR receives payphone calls. The auditor must prepare this SBR System Audit Report according to AICPA guidelines for such letters¹²¹ and provide sufficient information in the letter for a reader to understand what criteria the auditor applied to the tracking system before attesting to its accuracy.¹²² At the same time that it files its SBR System Audit Report, to facilitate resolution of payment disputes, the SBR must also file with the Secretary, and send copies to its facilities-based long distance carriers and PSPs, a letter including the name, company, address and phone number for the person or persons responsible for handling payphone compensation and disputes over payphone compensation. If the responsible person or persons change during the course of the year, the SBR shall provide the Commission, the PSPs and the long distance carriers within 60 days of such change the names and contact information for the new company contacts. Subject to protections safeguarding the confidential and proprietary information of the auditor and the SBR,¹²³ a SBR must provide to a requesting PSP for inspection all documents, including underlying work papers that form the basis for the SBR System Audit Report.

¹²⁰ Thus, for audits in subsequent years, the SBR will state in its representation letter that no material changes have occurred and the independent auditor will verify that the SBR's statement is complete and accurate. This streamlined audit approach will apply only after the SBR submits an initial audit report that indicates compliance.

¹²¹ AICPA ATTESTATION STANDARDS at §§ 6.30, 6.64.

¹²² See APCC Sept. 12 Certification and Audit *Ex Parte*, n.4.

¹²³ See Joint SBR Sept. 12 *Ex Parte* at 3.

44. Once these documents have been filed, we require payment be made quarterly. At the time the SBR compensates the PSP directly, the SBR must include with its payment a sworn declaration from its Chief Financial Officer certifying that the payment amount is accurate and is based on 100 percent of actual calls completed.¹²⁴ To support this certification, the SBR shall send to the PSP, in computer readable format, a report that includes the following information:

- A list of the toll-free and access code numbers dialed from each of that PSP's payphones and the ANI for each payphone;
- The volume of calls for each number that were completed;
- The name, address, and phone number of the person or persons responsible for handling the SBR's payphone compensation; and
- The carrier identification code ("CIC") of all facilities-based long distance carriers that routed calls to the SBR, categorized according to the list of toll-free and access code numbers.

These requirements will provide PSPs with further certainty that call completion data is accurate and further visibility into the basis for compensation.¹²⁵ To the extent that the SBR payments are late or incomplete, the Commission may impose forfeitures or even revoke section 214 authorization, if we find that SBRs have been lax in fulfilling their obligations. We note that the current base penalty for failure to file required forms or information with the Commission is \$3,000; however, we have discretion to impose substantially higher forfeitures based on the factors listed in our rules.¹²⁶ In addition, late payment or non-payment to PSPs could result in substantial forfeitures: up to \$120,000 for a single non-payment and up to \$1.2 million for a continuing violation. In egregious cases, we may issue an Order to Show Cause why we should not revoke a SBR's section 214 authority, and possibly bar the company's principals from participation in interstate telecommunications business activities without first obtaining explicit permission from the Commission.¹²⁷

¹²⁴ We note that this is a variation of Qwest's proposal that the Commission adopt an annual corporate officer certification of payphone data. Qwest Aug. 26 *Ex Parte*, Attach. To the extent that the SBR does not have a Chief Financial Officer, we require that the Chief Financial Officer of any of the SBR's affiliated companies to file the required certification. The SBR may not avoid this requirement by asserting that it does not have a Chief Financial Officer. See also Letter from Adam Kupetsky, Director of Regulatory Affairs, Wiltel, to Marlene H. Dortch, CC Docket No. 96-128 (Sept. 8, 2003) (Wiltel Sept. 8 *Ex Parte*) at 8; APCC Sept. 22 Certification and Audit *Ex Parte* at 3-4.

¹²⁵ As discussed below, a SBR and a PSP may agree to other compensation and reporting requirements.

¹²⁶ See 47 C.F.R. § 1.80(b)(4).

¹²⁷ See, e.g., *NOS Communications, Inc., Affinity Network Incorporated and NOSVA Limited Partnership*, Order to Show Cause and Notice of Opportunity for Hearing, FCC 03-75 (rel. Apr. 7, 2003); *Business Options, Inc.*, Order to Show Cause and Notice of Opportunity for Hearing, FCC 03-68 (rel. Apr. 7, 2003).

45. We decline to impose APCC's additional requested reporting requirements, specifically the requests that the SBR report the time and date of each reported toll-free and access code number, on the grounds that requiring such information to be routinely submitted on a quarterly basis would be overly burdensome.¹²⁸ However, in cases where disputes arise between a SBR and a PSP on the SBR's reported completed calls, information regarding the time and date that payphone calls were made, we recognize that such information is relevant and necessary for resolving these disputes. In this regard, we note that the Commission's rules permit PSPs to make claims for payphone compensation up to 18 months after the close of a payphone compensation quarter and specifically require LECs to maintain payphone verification data for this period of time.¹²⁹ To ensure that the PSPs have access to necessary data in the event of disputes with the SBRs, we will likewise require a SBR to retain for 18 months after the close of a payphone compensation quarter: (1) all of the data required for the reports required by this paragraph; and (2) the time and date of every call identified in its quarterly report. We require SBRs to provide this data to the PSPs upon request.

46. We realize time is needed to effectuate such a system. Our rules require OMB approval before the information collections they contain may take effect, which may require as few as 120 and up to 150 days. The carriers state that they need at least one full quarter after notice of the new rules to change their networks to comply.¹³⁰ In addition, the carriers state that it would disrupt the payment scheme if the new rules were to go into effect on a day other than the first day of a quarter. This is because payphone compensation industry practices are based on a quarterly system. We find that the carriers will have sufficient time to develop a reliable call tracking system and obtain the necessary certification from an independent third-party auditor during the time it takes to receive OMB approval. However, because the industry would suffer payphone compensation disruptions if the information collections contained in the rules went into effect mid-quarter, the effective date shall be the first day of the first full quarter following OMB approval of the rules.

47. We further note that the record in this proceeding indicates that commercial resources exist that can easily facilitate the verification we require, such as accounting firms that are experienced at developing such internal controls for interexchange carriers and SBRs.¹³¹ Indeed,

¹²⁸ Letter from Albert H. Kramer, Robert F. Aldrich, Attorneys for APCC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Sept. 22, 2003) (APCC Data Requirements *Ex Parte*) at 4-5.

¹²⁹ See 47 C.F.R. § 64.1310(c).

¹³⁰ See AT&T Sept. 5 *Ex Parte* at 2; Sprint Sept. 5 *Ex Parte* at 1; See also Letter from John E. Benedict, Senior Attorney, Sprint, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (dated Sept. 5, 2003) (Sprint Sept. 5 *Ex Parte*) at 1 (the large majority of Sprint's SBR customers do not currently provide their own call tracking data); see also OCMC Comments at 10. Qwest Sept. 10 *Ex Parte* at 3; Letter from James U. Troup, Adrian B. Copiz, Attorneys for Joint SBRs, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Sept. 22, 2003) (Joint SBRs Sept. 22 *Ex Parte*) at 2; and Joint SBR Commenters Sept. 22 *Ex Parte* at 2 (explaining that several SBRs would be able to implement a SBR-pays system immediately, while others would be able to convert to such a system within a predicted transition period of 120 to 150 days).

¹³¹ MCI August 19 *Ex Parte* at 4; see also APCC Sept. 12 Certification and Audit *Ex Parte* at 4.

the record indicates that many SBRs already have call tracking systems in place and in some instances need only obtain an attestation letter from an independent third-party auditor.¹³² MCI points out that 39% of its SBR customers claim to have reliable systems, but fail to provide MCI data, as agreed, on a monthly basis.¹³³ However, MCI contends that these SBRs' call tracking system may be quickly verified and qualified to track completed calls on a quarterly basis, as we would require in our new rules.¹³⁴ Accordingly, we find that these SBRs' compensation systems would similarly permit accurate compensation directly to the PSP well before the 120 to 150 day OMB review period concludes.

48. We further conclude that SBRs and PSPs may negotiate other mechanisms for payment other than those set forth in our rules.¹³⁵ Specifically, we find that the SBR may enter into any other compensation arrangement voluntarily agreed to by the relevant parties.¹³⁶ By adopting rules that require SBRs to develop tracking systems, we do not intend here to nullify current or future contractual arrangements if the parties wish to continue them. For example, a PSP and a SBR may agree by contract that the SBR may rely upon the interexchange carrier to track data and compensate the PSP directly in exchange for SBR payment for all calls that pass to the SBR's platform, completed or otherwise.¹³⁷ Accordingly, we permit SBRs to rely upon any

¹³² MCI August 19 *Ex Parte*, at 17. For example, MCI points out that 12 percent of its SBR customers currently provide timely data in usable formats to meet quarterly compensation obligations.

¹³³ MCI Comments at 24.

¹³⁴ *Id.* See also IDT Sept. 12 *Ex Parte* at 2 (contending that PSPs and SBRs should have "considerable freedom to contract, if both parties voluntarily choose to do so.").

¹³⁵ As AT&T points out, such private agreements are "perfectly consistent" with section 276. AT&T Comments at 10. In the context of a private contract, we expect a PSP to preserve its right in such an agreement to obtain sufficient information to verify the accuracy of the compensation received. We note that private agreements may also appropriately designate a court, rather than the Commission, as the forum for enforcement. See AT&T Sept. 5 *Ex Parte* at 2; see also IDT Sept. 12 *Ex Parte* at 2.

¹³⁶ MCI states that 49% of its SBR customers have agreed to pay a surcharge for all calls sent to their SBR platforms rather than invest in call tracking technologies or provide call completion data. These generally are the smallest SBR customers that do not find it economical to invest in payphone compensation tracking systems. Accordingly, our new rule permitting such arrangements, with the agreement of the PSP and the interexchange carrier, will permit SBRs the choice of investing in the required assets. MCI Comments at 24. See also Sprint Sept. 5 *Ex Parte* at 1 (the large majority of Sprint's SBR customers do not currently provide their own call tracking data); see also OCMC Comments at 10. See Letter from Larry Fenster, Senior Economist, MCI, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Aug. 20, 2003); Letter from Teresa Marrero, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128 (Sept. 5, 2003) (AT&T September 5 *Ex Parte*), at 2. AT&T states that prior to the *Second Order on Reconsideration*, approximately 40% of AT&T's SBR customers opted to pay for all calls delivered to their platforms. We agree with AT&T that under our new rules, it is likely that some SBRs (those with high call completion rates) will opt into voluntary agreements with AT&T, while other SBRs (those with low call completion rates) will opt instead to pay PSPs directly. AT&T Sept. 5 *Ex Parte* at 2.

¹³⁷ We note, however, that if such contracts are not entered into by the effective date of our rules, SBRs are required to have in place an established call tracking system that complies with our new rules. See AT&T Comments at 2-3 ([T]he proper resolution of these issues requires a flexible solution that combines private agreements supplemented with mandatory regulations for instances where voluntary efforts fail").

current or future contractual arrangements they may have with interexchange carriers or PSPs provided that the PSP concurs.

49. We reject APCC's contention that MCI's audit proposal is inherently deficient because it does not set forth specific details with respect to the independent third-party auditor.¹³⁸ Specifically, APCC notes three deficiencies. APCC asserts that the MCI proposal fails to state the "type of third party" that would be qualified to conduct the audit.¹³⁹ APCC next asserts that, the first facilities-based long distance carrier "is better situated to verify the accuracy of the SBR's information" than an independent third-party. Finally, APCC contends that, because SBRs have failed to implement proper tracking systems, there is no reason to believe that an independent third-party would be successful in policing the data provided by the SBRs, and argues that MCI provides no information as to what outcome should result if the third-party verification is found to be unreliable or untrue. We are not persuaded by APCC's objections.¹⁴⁰

50. First, we find that the third-party independent auditor requirements that we adopt in this Order provide sufficient guidance to SBRs and PSPs for verifying the reliability of call tracking systems, contrary to APCC's assertion.¹⁴¹ Second, we disagree with APCC that the interexchange carriers are best situated to verify accurate compensation and therefore should remain liable for verifying SBR information. As explained above, the interexchange carrier does not have a means of tracking calls to completion; it simply is unable to verify the accuracy of the call data. As we explain in this Order, the last SBR in the call path that receives the toll-free or access code call is solely responsible for compensating the PSP, and ensuring that the PSP is not overpaid or underpaid. Because compensation responsibility no longer rests with the interexchange carrier, it would serve no logical purpose to deem it responsible for verifying SBR data. However, our new rules include additional reporting measures for interexchange carriers and other carries in the call path, which we expect will provide all parties further assurance and confirmation that the data SBRs provide to interexchange carries and PSPs is correct. Third, we disagree with APCC that PSPs have no recourse if a third-party auditor system attestation is found to be unreliable or untrue.¹⁴² We note that if the third-party system attestation is found to be unreliable or untrue, then absent any other arrangement, the SBR would be in violation of our

¹³⁸ APCC Reply Comments at 27-28.

¹³⁹ *Id.* at 27.

¹⁴⁰ *But see* APCC Sept. 12 Certification and Audit *Ex Parte*; *see also* Joint SBRs Sept. 22 *Ex Parte*; OCMC Sept. 23 *Ex Parte*; IDT Sept. 26 *Ex Parte* (arguing that third-party verification is not necessary).

¹⁴¹ For example, as we describe in this section, the independent auditor must perform its evaluation in accordance with the AICPA Attestation Standards.

¹⁴² APCC Sept. 12 Certification and Audit *Ex Parte*; Joint SBRs Sept. 22 *Ex Parte*; OCMC Sept. 23 *Ex Parte*; IDT Sept. 26 *Ex Parte*.

rules, and could possibly be subject to an enforcement action.¹⁴³ We also note that if the PSP suffers harm from such an improper attestation, the PSP may have remedies at law.¹⁴⁴

E. Carrier Reporting Duties

51. We adopt new reporting obligations for all facilities-based long distance carriers in the call path that own or lease a switch and transfer payphone-originated calls to other facilities-based long distance carriers. We refer to these carriers for purposes of these rules as the "Intermediate Carriers" to distinguish them from the last facilities-based long distance carrier that completes the call on a switch that it owns or leases.¹⁴⁵ Specifically, we require these "Intermediate Carriers" to maintain, and provide to the PSP a quarterly report,¹⁴⁶ in computer readable format, that includes, for each facilities-based long distance carriers to which the Intermediate Carrier switched a toll-free or access code call:

- A list of all the facilities-based long distance carriers to which the Intermediate Carrier switched toll-free and access code calls;
- A list of all the toll-free and access code numbers that all LECs have delivered to the Intermediate Carrier and that the Intermediate Carrier switched to the identified facilities-based long distance carriers;
- The volume of calls for each toll-free and access code number, e.g., "800" and "888" numbers, that the Intermediate Carrier has received from each of that PSP's payphones, identified by their ANIs, and switched to the facilities-based long distance carrier;¹⁴⁷ and
- The name, address, telephone number and other identifying information for the person or persons for each of the facilities-based long distance carriers that serve as the Intermediate Carrier's contact at each listed facilities-based long distance carrier.

Moreover, for the same reasons discussed in section D above, to ensure that the PSPs have access to necessary data in the event of disputes with the SBRs, we will require the Intermediate Carrier

¹⁴³ *Id.*

¹⁴⁴ Furthermore, we disagree with commenters that assert that our rules must anticipate all of the enforcement issues that may arise. See RBOC Payphone Coalition Sept. 22 *Ex Parte* at 4; see also APCC Reply at 14-15.

¹⁴⁵ We note that with respect to these new reporting obligations, we do not include LECs that transfer calls to the first facilities-based long distance carrier.

¹⁴⁶ We expect that SBRs that choose not to compensate the PSP directly, but enter into some other compensation arrangement with the long distance carrier and/or PSPs, will include in such agreements the terms and conditions of payment, including frequency of payment and "true-up."

¹⁴⁷ See APCC Sept. 22 Data Requirements *Ex Parte* at 3.

to maintain for 18 months after the close of a payphone compensation quarter: (1) all of the data required for the reports required by this paragraph and (2) the time and date of every call identified in its quarterly report. We require the Intermediate Carrier to furnish this information to the PSP upon request.

52. The reporting obligations we adopt today cover a larger class of carriers than those affected by the *Second Order on Reconsideration*, which applied only to the first long distance carrier and require the submission of more detailed information.¹⁴⁸ In the *Second Order on Reconsideration* the Commission found that some long distance carriers unilaterally determined that they were not responsible for paying compensation for calls routed to SBRs, and failed to identify which resellers were responsible for compensation, even when the PSP requested such information.¹⁴⁹ Our new rules address this situation by requiring each facilities-based long distance carrier in the call path to provide a name and address of a contact at each facilities-based long distance carrier.¹⁵⁰ We expect this additional information will improve the "audit trail" for the PSPs by providing a means to verify the accuracy of call tracking reports from carriers in the call path.¹⁵¹ Moreover, for the first time, we require that all lists supplied to the PSP of toll-free and access code number, identify and categorize by name the facilities-based long distance carrier to which the call is switched. Previously, such lists were not disaggregated nor organized by carrier name, making it difficult for PSPs to identify and pursue delinquent SBRs.¹⁵² Thus, these new requirements will enable a PSP to identify SBRs that are not compensating it and to challenge the payments in instances where the PSP may believe that the data provided by other facilities-based long distance carriers is out of proportion to the data provided by the final SBR in the call path.¹⁵³

¹⁴⁸ *Second Order on Reconsideration*, 16 FCC Rcd at 8106, para. 18.

¹⁴⁹ The Commission was persuaded by PSP arguments that when the interexchange carrier and the switch-based reseller determined independently that neither was responsible for compensation on a call, they did not track the call. Moreover, the prior rule may not have captured all of the information necessary for a PSP to identify the final SBR in the call path that completes the call because it did not take into account the fact that there may be multiple facilities-based long distance carriers in the call path; see *Second Order on Reconsideration*, 16 FCC Rcd at 8106, para. 18.

¹⁵⁰ IDT Sept. 12 *Ex Parte* (contending that the Commission should "focus on ensuring that [interexchange carriers] submit sufficient contact information to PSPs regarding their SBR" so that PSPs are informed of responsible party.).

¹⁵¹ APCC Comments at 6.

¹⁵² *Id.* at 6-7.

¹⁵³ Our new rules adopt a subset of the Qwest, "Last Switch Rule" proposal. See Qwest Comments at 12-13. For example, we do not adopt the Qwest "full-call detail" requirement. Qwest Sept. 10 *Ex Parte* at 2-3. We find that such a requirement is not necessary to ensure that a PSP is paid for every completed call and would be overly burdensome to the interexchange carriers. As we explain, *supra*, we find that our new rules sufficiently aid the PSP by requiring each facilities-based long distance carrier in the call path to provide a name and address of a contact at each facilities-based long distance carrier, as well as a list of each 800 number for which the SBR is responsible. We expect this information will provide the PSP with a means to verify the accuracy of call tracking reports. Our requirement that the SBR's call tracking system be capable of counting so-called "# redials," and that (continued....)

53. Furthermore, we find that these new reporting obligations will have no adverse impact on small carriers. The record in this proceeding indicates that facilities-based long distance carriers in the call path already collect the data necessary to comply with these reporting requirements as part of their own call tracking and billing systems.¹⁵⁴ Thus, we do not impose any new collecting responsibilities; rather we require additional *reporting* obligations.¹⁵⁵ And, we note that, to the extent that a PSP affirmatively declines the need for such information, the PSP is free to negotiate alternative arrangements with the relevant carriers.¹⁵⁶

54. We conclude that the rules we adopt today resolve two principle concerns: (1) the inability of PSP to obtain information about the identity of the SBR, and the number of completed calls; and (2) the incentive of the SBR to avoid detection and paying the PSP. First, our new rules require the SBRs to establish a verifiable call tracking system that must enable the SBR to produce accurate, timely data that is passed along to the PSP. We find that this requirement significantly improves on the *Second Order on Reconsideration's* efforts to meet the statutory obligation of providing "fair compensation to the PSP" because it assists the PSP by providing additional, accurate information that it could not obtain under our previous rules; and it assists the SBR by ensuring that it pays only for completed calls rather than all calls that pass to the SBR platform. Second, by imposing an affirmative duty on the SBR to compensate the PSP, our new rules target those SBRs that have attempted to avoid detection.¹⁵⁷ Accordingly, we conclude that our new compensation regime substantially improves upon our earlier payment regimes.

F. Interim Rules

55. Due to information collection and exchange requirements pursuant to OMB procedures, and the need to provide carriers time to transition to our new rules, the new rules will not take effect immediately. On average, OMB approval requires as few as 120 and up to 150

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the auditor attest to this, will ensure that every completed call is compensated. Moreover, we reject the proposed web site publication requirements because we find the rules can achieve the same goals without risking violations of confidentiality or creating competitive disclosure problems. We require PSPs to use this additional information for compensation purposes only, and prohibit all entities from sharing such information with their internal divisions that compete with the interexchange carriers. *See also* Sprint Sept. 5 *Ex Parte*; APCC Sept. 22 Data Requirements *Ex Parte* at 2-3; OCMC Sept. 26 *Ex Parte*; IDT Sept. 26 *Ex Parte* at 1-2.

¹⁵⁴ MCI Comments at 31.

¹⁵⁵ APCC Comments at 22-25. *See* Letter from John E. Benedict, Senior Attorney, Sprint, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 96-128, (Sept. 3, 2003) (Sprint Sept. 3 *Ex Parte*) at 1. Sprint opposes Qwest's certification and data reporting requirements, arguing that it would impose on all carriers massive data and reporting requirements that are disproportionate to any need for the information. However, as stated above, the record indicates that facilities-based long distance carriers already collect the data necessary to comply with these reporting requirements as part of their tracking and billing system.

¹⁵⁶ *See* Sprint Aug. 14 *Ex Parte* at 6 (proposing that the reporting requirements be conditioned on an affirmative request by a PSP); Sprint Sept. 5 *Ex Parte* at 1.

¹⁵⁷ APCC Reply at 4; AT&T Comments at 14-16; MCI Comments at 14, 25.

days from the release of the Order. Moreover, as described above, carriers have indicated that they need at least one full quarter after notice of the new rules to make necessary changes to their networks, and that it would be disruptive if the new rules were to go into effect on a day other than the first day of a quarter.¹⁵⁸ During this period, we adopt, on an interim basis, the rules initially adopted in the *Second Order on Reconsideration* until the new rules become effective, to ensure that payphone compensation continues to be paid as required by section 276.¹⁵⁹ In this regard, we find it reasonable to readopt the rules adopted in the *Second Order on Reconsideration* until the first day of the first full quarter after the new rules become effective.

56. We base this finding on several reasons. First, we recognize that reimposing the current rules would minimize disruption to the industry. The current rules have governed PSP compensation for the past two years, and form the basis for contractual relationships between affected parties today. We note that the adoption of a new, short-term interim approach would disrupt these established business relationships and would require changes to existing contracts, systems and practices – and that these new contracts, systems and practices would be undone only months later when the new rules become effective. This two-step rule change would lead to disruption and confusion that would not serve the goals of section 276.¹⁶⁰ Second, to the extent we do not readopt the existing rules, the rules that would otherwise take effect are those that existed prior to the *Second Order on Reconsideration*. As explained in detail above and in the *Second Order on Reconsideration*, these rules have proven to be unworkable. We thus decline to readopt them on an interim basis. In sum, the rules adopted today represent the most effective way to implement the statutory mandate of section 276 but, until they can be implemented, we find that the current rules serve as a reasonable transitional approach governing PSP compensation under section 276.

IV. PROCEDURAL MATTERS

A. Effective Date for Interim Rules

57. The interim rules we adopt today will be effective upon publication in the Federal Register. Based on the circumstances described below, we find good cause, pursuant to 5 U.S.C. § 553(d), to make the interim rules effective on less than 30 days following their publication. When the *Sprint* mandate issued, the current rules were vacated, but the new rules cannot take effect for at least five months. Without further action, that interim period would be subject to the original rules adopted in 1996 and 1998. Yet, as we have explained above, those rules failed to fulfill the statutory requirement of fair compensation.¹⁶¹ The vacated rules were adopted to

¹⁵⁸ See para. 46, *supra*.

¹⁵⁹ The interim rules are set forth in Appendix B.

¹⁶⁰ We also note that it is well-established in the courts that avoidance of market disruption pending broader reforms is a standard and accepted justification for a temporary rule. See, e.g., *WorldCom v. FCC*, 308 F.3d 1, 13 (D.C. Cir. 2002) (and cases cited therein).

¹⁶¹ See, e.g., *Second Order on Reconsideration*, 16 FCC Rcd at 8102 n.22.

address these problems, and the court presumably stayed issuance of the mandate in order to forestall another period of serious under-compensation. For the same reason, we now take steps to forestall another period of under-compensation and the consequent economic hardship imposed on PSPs. Accordingly, we find that there is good cause to make the interim compensation rules effective immediately upon publication in the Federal Register. Doing so will place no irremediable burden on the interexchange carriers. As interexchange carriers have been operating under those very rules for the past two years, they do not need additional time in which to prepare to comply. Moreover, there is little likelihood of any monetary harm to the interexchange carriers as the interim rules permit them to recover from their resellers all compensation that the interexchange carriers must pay for a call handled by the reseller, plus a charge for overhead. The potential for great harm to PSPs from postponing the effectiveness of the interim rules far outweighs the minimal potential harm to interexchange carriers.

B. Final Paperwork Reduction Act Analysis

58. This Report and Order contains conclusions that have been analyzed as required by the Paperwork Reduction Act of 1995, Public Law No. 104-13, and contains collections of information subject to Office of Management and Budget (OMB) review. The information collection requirements in this item are contingent upon approval by OMB.

C. Final Regulatory Flexibility Analysis

59. *Interim Rules.* The Regulatory Flexibility Act of 1980, as amended (RFA),¹⁶² requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."¹⁶³ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁶⁴ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁶⁵ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁶⁶ We certify that, under the Regulatory Flexibility Act, 5

¹⁶² The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹⁶³ 5 U.S.C. § 605(b).

¹⁶⁴ 5 U.S.C. § 601(6).

¹⁶⁵ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

¹⁶⁶ 15 U.S.C. § 632.